



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 5, 1992

Mr. Terrence S. Welch  
Vial, Hamilton, Koch & Knox  
1717 Main Street, Suite 4400  
Dallas, Texas 75201

OR92-187

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 14066.

The Town of Flower Mound (the town) received two open records requests for, *inter alia*, attorney billing statements that you or your law firm have billed to the town. You have submitted in response to these requests copies of the town's general municipal billings from September, 1990, to September, 1991. You contend that portions of these itemized bills come under the protection of the litigation exception, section 3(a)(3), and the attorney-client privilege as that privilege is incorporated in section 3(a)(7) of the Open Records Act. You also indicate that a few portions of the statements must be withheld pursuant to section 3(a)(1), which protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision."

To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Further, the governmental body's attorney must show that the requested material relates to the litigation. See Open Records Decision No. 551 (1990).

This office has learned that several of the contested matters on which you base your section 3(a)(3) claim are no longer pending. Once litigation regarding a particular matter has concluded, section 3(a)(3) is no longer applicable.<sup>1</sup> Open Records Decision Nos. 551 (1990); 350 (1982). Accordingly, you may not withhold any of the information that you have marked as being protected by section 3(a)(3) that relates to matters that have been resolved since the time you received the open records requests. This office agrees, however, that the information you have marked in the billing statements that pertains to matters that are currently in trial or on appeal may be withheld at this time pursuant to section 3(a)(3).

You also claim the protection of section 3(a)(7). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's written advice to his client and a client's confidential communications to his attorney. Open Records Decision No. 574 (1990). Similarly, the content of attorney billing statements may be withheld pursuant to section 3(a)(7) only to the extent that the release of the information would reveal the attorney's advice or a client's confidences. Open Records Decision No. 589 (1991). Although the invoices submitted to this office contain notations that privileged communications may have taken place, many of the notations do not tend to reveal the substance of those communications. We also note that the attorney-client privilege protects only those communications between the town's attorney and its officers and employees; communications between the town's attorney and third parties fall outside the ambit of the privilege. See Tex. R. Civ. Evid. 503(b). We have marked the items that do not reveal the substance of privileged attorney-client communications; the town may, however, withhold the remaining items that you have marked as protected by section 3(a)(7).

You assert that portions of some of the billing statements are made confidential by the Texas Medical Practices Act, V.T.C.S. art. 4495b, which provides in pertinent part:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

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<sup>1</sup>We also note that the notations regarding EEOC actions are not made confidential by 42 U.S.C. section 2000e-5(b). See Open Records Decision No. 155 (1977).

V.T.C.S. art. 4495b, § 5.08(b). The billing statements at issue do not constitute confidential medical records for purposes of the Texas Medical Practices Act; accordingly, the town may not withhold the portions of the statements that you have marked on these grounds.

Nor may those portions of the statements be withheld pursuant to the common law right to privacy. Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). After a careful review of the information at issue, we have determined that the release of the information at issue would not result in a violation of any identifiable individual's privacy rights.

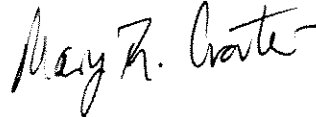
You also assert that the release of other marked portions of the billing statements would implicate the Fourteenth Amendment liberty interests of certain town employees or former employees. It is not clear to this office from your written submissions or from the face of the documents how individuals' Fourteenth Amendment liberty interests would be compromised by the release of this information. Accordingly, this office finds your constitutional claims to be without merit.

Finally, you must also release all portions of the billing statements that reflect your law firm's work pertaining to the investigation and termination of former police chief Dennis Hazelwood. These portions of the statements were specifically deemed public by this office when the town failed to submit copies of those statements pursuant to prior open records rulings. *See* Open Records Letters OR91-481; OR91-413 (1991).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with

a published open records decision. If you have questions about this ruling, please refer to OR92-187.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

MRC/RWP/lmm

Ref.: ID# 14066  
ID# 14094  
ID# 14135

Enclosures: Marked documents

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